

Banquet Session—Thursday, June 17, 7 p. m.

Los Angeles County Medical Building

Fred B. Moor, M. D., Chairman.

John Severy Hibben, M. D., Toastmaster.

Recent Advances in Physical Therapy Methods—Frank H. Krusen, M. D., Rochester, Minnesota.

Announcement: The American Congress of Physical Therapy will hold the sixteenth annual session at Cincinnati, Ohio, on September 20 to 24, 1937, at the Netherland Plaza Hotel. For information, write to American Congress of Physical Therapy, 30 North Michigan Avenue, Chicago, Illinois.

MEDICAL JURISPRUDENCE†

By HARTLEY F. PEART, ESQ.

San Francisco

Legal Relationship of Physicians to Their Patients and Scope of Physicians' Authority with Respect to Physical Examinations, Treatment, and Operations

The relation between a physician and his patient is said by the courts to be one of trust and confidence. Consequently, it is also the law that all dealings between a physician and his patient will be closely scrutinized, particularly those inuring to the benefit of the physician. Because of the trust and confidence involved, communications between a physician and his patient are privileged. (See Calif. Code of Civ. Pro., Sec. 1881.) A breach of medical confidence is universally regarded as unethical. But, in so far as the courts are concerned, the question whether a disclosure of a professional confidence may be the foundation of an action at law by the patient, depends on the character of the disclosure made. In other words, a breach of medical confidence is not *always* unlawful. For example, in *Simonsen vs. Swenson*, 104 Neb. 224, 177 N. W. 831, a physician who, in good faith and with reasonable grounds, decided upon confidential information given by his patient that the patient had a contagious disease, was not liable in damages to the patient for such disclosure to others made in order to prevent the spread of the disease. In so far as the law is concerned, if a disclosure of professional confidence will have a tendency to promote the general welfare of the community, a disclosure will not be actionable in the courts; but if a disclosure is made maliciously or for the sole purpose of injuring the patient, an action for damages would probably be allowed.

The relation of physician or surgeon and patient is also said to be one arising out of a contract, express or implied. If there is an oral or written agreement relating to the rights and duties of the physician with respect to his patient, there is an express contract. If there are merely acts and conduct by both parties the contract is said to be implied.

Since the duty owed to a patient is measured and determined primarily by the contract of employment, a physician or surgeon may by special agreement or notice limit the extent or scope of his employment.

Unless the terms of employment or notice limit the services to be given, the relation of physician and patient and the physician's employment continue until the physician's services are no longer needed or until terminated by common or mutual consent or at the will of either party.

As the relationship between a physician and his patient is contractual in nature as well as confidential, the ordinary rules with respect to breach of contract are applied by the courts in actions relating to the performance by the physician of his duties. It must be remembered that a physician who accepts a patient has entered into a contract and as such is obligated to render all of the services contemplated by the parties and is privileged to examine, treat or operate upon the body of the patient in so far as such physical con-

tact is necessary in order to carry out the duties imposed by the employment contract, *but only to that extent*. If a physician exceeds the scope of his employment, he may not rely upon the contractual relationship of physician and patient and he may be guilty of a battery or a trespass or both.

An illustration of the foregoing legal principles may be helpful. Some years ago a physician was employed to perform a surgical operation for the removal of a hernia in the region of the right groin of the patient. The operation was performed, and some months later an action at law was commenced against the physician in which the patient alleged that the physician had, in the course of performing the hernia operation, committed a trespass in that he had removed one of the patient's testicles without his consent and against his express direction. One of the District Courts of Appeal held that the patient's allegations stated a cause of action and that if the patient could prove the truth of his allegations he would be entitled to recover damages. The Court said:

The contention is made by (the physician) that the complaint states no cause of action for the removal of plaintiff's testicle without his consent. We think that it does, and that if this issue alone had been submitted to the jury a finding upon it in favor of plaintiff might have been sustained.

See *Markhart vs. Zeimer*, 67 Cal. App. 363.

The task of enumerating and discussing all of the acts which a physician may do in a particular case and which may legally be beyond the scope of his employment contract would require a great deal more space than is available. Dr. William C. Woodward, Director of the Bureau of Legal Medicine and Legislation of the American Medical Association, has discussed this subject fully and accurately in an excellent article appearing in the issue of January 4, 1936 (Vol. 106, No. 1) of the *Journal of the American Medical Association*, entitled "Authorization of Physical Examinations, Treatment, Operations, and Autopsies."

Doctor Woodward's opening paragraph is a concise summarization of the legal principles involved. It is as follows:

A physical examination of a patient cannot be made or an operation done, lawfully, without authority. Authority is necessary, too, before a physician can lawfully apply to a patient any prophylactic, diagnostic or therapeutic agent, such as a vaccine, a splint, roentgen rays, or an anesthetic or any other drug. A person who does any of these acts without authority commits a battery or a trespass, or both, for which, according to the circumstances of the case, he may be fined or imprisoned or made to pay damages. Even after the death of a patient his right to freedom from interference automatically passes in a modified form to his spouse or to his next of kin, and any unauthorized interference with his dead body exposes the offender to a suit for damages by the person entitled to its custody. My purpose in this paper is to show, so far as the limits of available space permit, what constitutes lawful authority for the doing of these acts, the performance of which plays so large a part in the daily work of the medical profession.

"Authority" as used by the courts means primarily inclusion of the particular act to be done within the scope of the employment contract. Normally, "authority" is obtained by the physician from his patient by means of oral or written consent.

Generally speaking, if consent to the doing of a particular act is obtained, no legal liability for the doing of that act can arise, but this is not always true, for as Doctor Woodward states:

Consent, however, even by the patient himself, is not necessarily valid. Consent may be invalid (1) because it undertakes to authorize an unlawful act or an act contrary to public policy, or (2) because it comes from a person who has no lawful right to give consent, or (3) because it was obtained by misrepresentation or fraud.

Doctor Woodward's article contains a discussion of the various conditions which may make a consent invalid. Every member of the Association is urged to read the article carefully. If it has been read once before, read it again. It will do no harm and may prevent an unfortunate experience to refer to the article every time there is the least doubt concerning a contemplated physical examination, treatment, or operation.

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†Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, containing copy submitted by Hartley F. Peart, Esq., will contain excerpts from and syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.